IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee/Respondent, v. MARTÍN RAUL SOTO-FONG, Appellant/Petitioner.	2 CA-CR 2006-0091 2 CA-CR 2006-0056-PR (Consolidated) DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL AND PETITION FOR REVIEW
FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-39599

Honorable Clark W. Munger, Judge

AFFIRMED
REVIEW GRANTED; RELIEF DENIED

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H O W A R D, Presiding Judge.

¶1 This consolidated appeal and petition for review of the denial of post-conviction relief under Rule 32, Ariz. R. Crim. P., 17 A.R.S., arises out of three murders that occurred in 1992 at the El Grande Market in Tucson.[1] After a 1993 jury trial, appellant Martín Raul Soto-Fong was convicted of three counts of first-degree murder, one count of armed robbery, two counts of attempted armed robbery, one count of aggravated robbery, and two counts of attempted aggravated robbery. He was sentenced to death for each of the three murders and a combination of consecutive and concurrent, aggravated prison terms for the remaining six convictions. The Arizona Supreme Court affirmed Fong's convictions and sentences on direct appeal. *State v. Soto-Fong*, 187 Ariz. 186, 211, 928 P.2d 610, 635 (1996).

¶2 Fong then filed his first Rule 32 petition and the trial court denied relief. He next filed his second notice of post-conviction relief, identifying numerous claims he intended to raise, including the claim that his death sentences were unconstitutional because he was under eighteen years of age at the time of the offenses. Shortly after he filed his second notice, but before he filed a petition, the United States Supreme Court decided *Roper v. Simmons*, 543 U.S. 551, 578, 125 S. Ct. 1183, 1200 (2005), in which it held that the execution of a person who was a minor at the time of the offense is cruel and unusual

[1]The Arizona Supreme Court set forth the facts relating to these offenses in its opinion on direct appeal. *See State v. Soto-Fong*, 187 Ariz. 186, 190-91, 928 P.2d 610, 614-15 (1996). We will repeat them here only as necessary.

punishment. Based on *Roper*, the trial court vacated the death sentences and set the murder convictions for resentencing.

¶3 Because many of the claims in Fong's Rule 32 petition were based on the death penalty, the trial court ruled those claims were moot. It also found that, in his petition, Fong had withdrawn many of the claims he had originally identified in the notice, and that most of the other claims were precluded or not colorable. But it found one claim—new evidence of actual innocence based on an article appearing in the New Yorker magazine—was potentially colorable and gave Fong time to investigate that claim. Nearly six months later, the court summarily dismissed the claim, stating Fong had "failed to present any evidence supporting a claim of 'actual innocence.'"

¶4 The court held a two-day resentencing hearing on the murder convictions and ultimately resentenced Fong to three consecutive prison terms of life without the possibility of release for twenty-five years. Having never vacated the sentences on the non-murder convictions, the court ordered them to "remain as previously ordered." This appeal and petition for review followed.

APPEAL[2]

Judge Bias

¶5 Fong argues the presiding judge erred by failing to grant his motion for a change of judge based on bias or prejudice pursuant to Rule 10.1, Ariz. R. Crim. P., 16A A.R.S., which he filed after the murder convictions were remanded for resentencing. We review the denial of a motion for change of judge based on prejudice for an abuse of discretion. *See State v. Thompson*, 150 Ariz. 554, 557-58, 724 P.2d 1223, 1226-27 (App. 1986). A criminal defendant is "entitled to a change of judge if a fair and impartial hearing or trial cannot be had by reason of the interest or prejudice of the assigned judge." Ariz. R. Crim. P. 10.1(a). We presume a trial judge is "'free of bias and prejudice.'" *State v. Rossi*, 154 Ariz. 245, 247, 741 P.2d 1223, 1225 (1987), *quoting State v. Neil*, 102 Ariz. 110, 112, 425 P.2d 842, 844 (1967). To overcome the presumption, the challenging party "must set forth a specific basis for the claim of partiality and prove by a preponderance of evidence that the judge is biased or prejudiced." *State v. Medina*, 193 Ariz. 504, ¶ 11, 975 P.2d 94, 100 (1999).

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[2]We address those issues Fong raises and argues adequately. In several of his argument headings, he contends the trial court's decision violated his constitutional rights to a fair sentencing, due process and to be free from cruel and unusual punishment. But in some of his arguments he does not cite any other authority or even explain the connection between the trial court's ruling and the alleged constitutional violation. We find Fong has failed to develop those arguments adequately and thus has waived them. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi), 17 A.R.S.; *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

¶6 After the Rule 32 status conference on April 25, 2005, Fong filed a motion for a change of judge, arguing Judge Munger had been hostile to him at the conference and ignored his claims for relief based on innocence and newly discovered evidence, when he set a resentencing proceeding based on *Roper* without entertaining those claims first. The presiding judge denied his motion, finding "no evidence of pervasive or concentrated behavior on the part of Judge Munger to suggest bias or prejudice."

¶7 Fong contends the record is clear that "Judge Munger was biased against [him] and hostile to his claims of innocence from the onset of second postconviction proceedings." He cites Judge Munger's "behavior toward the defense and the Mexican Consulate at the April 25, 200[5] hearing," arguing it "illustrated his prejudice, and prevented counsel from adequately making a record in violation of [his] right to due process." He points to two adverse rulings that occurred at the hearing: Judge Munger's decisions to go forward with sentencing despite the pendency of Fong's Rule 32 petition and to strike Fong's second supplement to his Rule 32 petition. Finally, Fong states that Judge Munger's "subsequent ruling on the scope of the resentencing and the imposition of the maximum sentence . . . demonstrate" bias and prejudice.

¶8 Fong's claim of prejudice is based on Judge Munger's behavior at one hearing[3] and his subsequent adverse rulings. He points to no other instances of allegedly inappropriate behavior during any of the remaining post-conviction or sentencing proceedings. Significantly, all of the remarks Fong challenges were directed not at Fong but at his counsel. "'Recusal based on the alleged appearance of hostility between an attorney and judge, or bias by a judge against an attorney, is not warranted except in extreme or rare instances.'" *State v. Curry*, 187 Ariz. 623, 631, 931 P.2d 1133, 1141 (App. 1996), *quoting United States v. Ahmed*, 788 F. Supp. 196, 202 (S.D.N.Y.), *aff'd*, 980 F.2d 161 (2d Cir. 1992). Upon review of the transcript of the entire conference, we find no error in the presiding judge's conclusion that Judge Munger's statements revealed nothing more than "an expression of frustration" with Fong's counsel.

¶9 Furthermore, "[d]isagreements over rulings are insufficient to support recusal." *Id.; see also State v. Schackart*, 190 Ariz. 238, 257, 947 P.2d 315, 334 (1997). In fact, two of the rulings Fong argues support his bias claim—the decisions to go forward with

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[3]Fong contends that the presiding judge "unfairly faulted [him] for presenting his evidence of bias from a 'single hearing,'" noting that he had only ten days from discovery of grounds for a change of judge to file his motion. *See* Ariz. R. Crim. P. 10.1(b), 16A A.R.S. But Fong did not allege below, nor does he argue here, that any grounds other than Judge Munger's behavior at the status conference and his adverse rulings required a change of judge for cause. And Fong did not file a subsequent motion for change of judge after the ruling on the scope of resentencing and the imposition of consecutive sentences, and therefore, cannot claim that failing to remove the judge after the rulings was error. We, however, will review these rulings on the limited basis that they could support his claim that the judge's actions at the hearing demonstrated bias.

resentencing before ruling on Fong's Rule 32 claims and to strike Fong's second supplement to his Rule 32 petition—are not rulings he challenges in his appeal or petition for review. *See Curry*, 187 Ariz. at 631, 931 P.2d at 1141 ("[W]e fail to understand how adverse rulings to which a party assigns no error can nevertheless amount to bias on the part of the judge.").[4] And, as we discuss below, the trial court's decision limiting resentencing to the murder convictions was correct and imposing those sentences consecutively was within the court's discretion. *See Schackart*, 190 Ariz. at 333, 947 P.2d at 256 (trial court's "proper" rulings "certainly d[id] not establish bias"). Thus, the trial court's rulings do not support Fong's claim of bias.

¶10 Fong nevertheless argues the trial court's decision to go forward with resentencing before resolving his Rule 32 claims was evidence that Judge Munger "ha[d] already drawn conclusions regarding Mr. Soto Fong's innocence and residual doubt claims." The record does not support this contention. Indeed, Judge Munger delayed ruling on Fong's Rule 32 petition because he had concluded one of his claims was potentially colorable, and he gave Fong additional time to investigate that claim. And, as Fong concedes, Judge Munger ultimately ruled on Fong's Rule 32 claims before resentencing him.

[4]Indeed, we fail to see how the ruling striking Fong's second supplement to his Rule 32 petition was even an adverse ruling. The supplement merely cited *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), and, despite the ruling striking the supplement, *Roper* was the very reason Fong's death sentences were vacated.

¶11 Moreover, even assuming the trial court's ruling could be interpreted as stating an opinion on the merits of Fong's claims, that would not support a claim of prejudice.

> "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."

State v. Henry, 189 Ariz. 542, 546, 944 P.2d 57, 61 (1997), *quoting Liteky v. United States*, 510 U.S. 540, 555-56, 114 S. Ct. 1147, 1157 (1994) (brackets in *Henry*). Accordingly, the presiding judge did not abuse his discretion in denying Fong's motion for change of judge.

Resentencing Issues

¶12 Fong argues the trial court abused its discretion when it ordered him to serve the prison terms consecutively.[5] Essentially, Fong restates the mitigation evidence that was presented to the trial court, arguing the court was required to impose concurrent terms. The imposition of sentence is within the court's discretion and "[w]e will find an abuse of sentencing discretion only if the court acted arbitrarily or capriciously or failed to adequately investigate the facts relevant to sentencing." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003); *see also State v. Fillmore*, 187 Ariz. 174, 184, 927 P.2d 1303, 1313 (App. 1996) (reviewing for abuse of discretion trial court's imposition of

[5]Because Fong's sentences on the non-murder convictions were never vacated, we only address the court's imposition of consecutive sentences on the murder convictions. *See infra* ¶¶ 20-21.

consecutive sentences). "The weight to be given any factor asserted in mitigation rests within the trial court's sound discretion." *Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 357.

¶13 Fong has not shown that the trial court failed to investigate all the facts relevant to sentencing. In fact, the trial court held a two-day sentencing hearing in which Fong presented nine witnesses and other evidence in mitigation. Rather than sentencing Fong immediately after the hearing, the trial court decided to delay sentencing to "digest some of the testimony." Before resentencing Fong, the trial court stated it had considered the original presentence report, the parties' resentencing memoranda, and the evidence presented at the two-day hearing. Fong also gave a statement to the court before he was sentenced. This is evidence from which we can conclude the trial court adequately investigated all relevant facts prior to resentencing. *See State v. Garcia*, 163 Ariz. 240, 241, 787 P.2d 139, 140 (App. 1990) (no abuse of discretion in consecutive sentences when record showed court considered all factors in sentencing).

¶14 Nor can we conclude that the imposition of consecutive sentences was arbitrary or capricious. The three victims were brutally murdered. And, although Fong proclaims his innocence, he stands convicted of those murders.

¶15 Fong notes that we may reduce the duration of a sentence if a defendant's "conviction is proper, but the punishment imposed is greater than under the circumstances of the case ought to be inflicted." A.R.S. § 13-4037(B). But, as our supreme court has noted when discussing its authority under this statute to reduce an excessive sentence,

"where a sentence is within the statutory limits we will not modify it in the absence of unusual circumstances." *State v. Herro*, 120 Ariz. 604, 606, 587 P.2d 1181, 1183 (1978); *accord State v. Valenzuela*, 109 Ariz. 1, 3, 503 P.2d 949, 951 (1972). Here, the sentences imposed—consecutive prison terms of life with the possibility of release after twenty-five years—were within the statutory limits. *See* 1988 Ariz. Sess. Laws, ch. 155, § 1; A.R.S. § 13-708. We find no circumstances sufficiently unusual for us to exercise our authority under § 13-4037(B).

¶16 Fong complains the trial court "made no aggravation or mitigation findings in his sentencing order," imposing consecutive sentences "without explanation." But the trial court was not required to make aggravation or mitigation findings, or set forth its reasons for imposing consecutive sentences. *See* § 13-708; *State v. Garza*, 192 Ariz. 171, ¶ 12, 962 P.2d 898, 901 (1998); *State v. Urquidez*, 213 Ariz. 50, ¶ 12, 138 P.3d 1177, 1180 (App. 2006).

¶17 Fong also minimally argues the trial court violated his constitutional rights to due process and to be free from cruel and unusual punishment when it sentenced him to consecutive prison terms. We review de novo whether a defendant's constitutional rights have been violated. *See State v. McCann*, 200 Ariz. 27, ¶ 5, 21 P.3d 845, 846 (2001). In recently addressing an Eighth Amendment argument regarding the severity of consecutive sentences, our supreme court stated:

> "Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence." . . .

> Thus, if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in aggregate. . . . This proposition holds true even if a defendant faces a total sentence exceeding a normal life expectancy as a result of consecutive sentences.

State v. Berger, 212 Ariz. 473, ¶ 28, 134 P.3d 378, 384 (2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 1370, *quoting United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988). Fong does not contend a sentence of life without the possibility of release for twenty-five years for first-degree murder is disproportionately long, but essentially contends his "consecutive sentences are lengthy in aggregate." *Id*. Because our supreme court made clear in *Berger* that such a circumstance does not render a defendant's total sentence unconstitutional, we find no violation of the Eighth or Fourteenth Amendments.

¶18 Fong argues the trial court erred by "adopting aggravation findings made thirteen years prior and rejecting overwhelming evidence undermining the aggravating factors." But the record reflects only that the trial court restated the aggravating factors found when Fong was sentenced originally; the trial court did not state that it had considered those factors in resentencing Fong. And at the time the murders were committed, the only statutorily authorized sentences for first-degree murder were death or life without the possibility of release for twenty-five years. *See* 1988 Ariz. Sess. Laws, ch. 155, § 1. *Roper* having eliminated the option of a death sentence, the only remaining option was a life

term of imprisonment. No finding of aggravating or mitigating factors was necessary.[6] *See State v. Fell*, 210 Ariz. 554, ¶ 11, 115 P.3d 594, 597-98 (2005) (under statute providing sentencing options of life with the possibility of parole or natural life, no finding of aggravating factors necessary to impose natural life term); § 13-708 (multiple sentences imposed against a person are to be served consecutively unless the court directs otherwise). Accordingly, the trial court had no need to find aggravating circumstances existed when it sentenced him on those counts. We find no error.

¶19 Similarly, we reject Fong's argument that the trial court erred by denying him a jury trial on aggravating circumstances. He received the only statutorily available sentences for the murder convictions, not aggravated terms. Thus, he had no right to have a jury determine the existence of aggravating factors. *See infra* ¶¶ 22-23.

¶20 Fong argues the trial court erred when it refused to resentence him on all counts. He contends that when his death sentences were vacated, his entire sentencing "package" came "unbundled." Federal courts construe "multiple sentences given a defendant convicted of more than one count of a multiple count indictment as 'a package,' reflecting the likelihood that the sentencing judge will have attempted to impose an overall punishment taking into account the nature of the crimes and certain characteristics of the criminal." *United States v. Handa*, 122 F.3d 690, 692 (9th Cir. 1997). The package is

[6]For the same reason, we reject Fong's argument that the trial court erred by refusing to consider the mitigating factor of residual doubt at sentencing, which, he claims, would have resulted in a mitigated sentence.

"unbundled" when part of the sentence is set aside as illegal and "the district court is free to put together a new package reflecting its considered judgment as to the punishment the defendant deserves for the crimes of which he is still convicted." *Id*.

¶21 But the "sentencing package" concept comes from federal, not Arizona, law. *See, e.g., United States v. Radmall*, 340 F.3d 798, 801 (9th Cir. 2003); *United States v. Ruiz-Alvarez*, 211 F.3d 1181, 1184 (9th Cir. 2000). Indeed, Arizona law squarely contradicts Fong's argument that his sentencing package came "unbundled" after *Roper*. In *State v. Clabourne*, 194 Ariz. 379, ¶ 57, 983 P.2d 748, 759 (1999), our supreme court found that the resentencing court had erred by addressing the defendant's noncapital sentences when the federal district court had only vacated the defendant's death sentence. Accordingly, the trial court did not abuse its discretion in refusing to resentence Fong on the non-murder convictions.

¶22 Citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), Fong argues the court should have empaneled a jury for his resentencing. But *Blakely* only requires a jury to find "'any fact *that increases the penalty for a crime beyond the prescribed statutory maximum*.'" *Id.* at 301, 124 S. Ct. at 2536, *quoting Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000) (emphasis added); *see also State v. Brown*, 209 Ariz. 200, ¶ 7, 99 P.3d 15, 17 (2004). The "'statutory maximum' . . . is 'the maximum sentence a judge may impose *solely on the basis of the facts reflected in*

the jury verdict or admitted by the defendant.'" *Brown*, 209 Ariz. 200, ¶ 10, 99 P.3d at 17, *quoting Blakely*, 542 U.S. at 303, 124 S. Ct. at 2537 (emphasis in *Blakely*).

¶23 As we have already explained, the only sentence available to the trial court on resentencing was life with the possibility of release after twenty-five years. The trial court did not need to make factual findings beyond the jury's verdict in order to impose the life sentences, *see id.; see also Fell*, 210 Ariz. 554, ¶ 11, 115 P.3d at 597, or to order them to be served consecutively. *See* § 13-708; *Urquidez*, 213 Ariz. 50, ¶ 12, 138 P.3d at 1180. Accordingly, the court's imposition of consecutive life terms of imprisonment for the three murders did not implicate the Sixth Amendment as interpreted in *Blakely*.

¶24 Fong also contends the trial court should have empaneled a jury for resentencing on the non-murder convictions. But *Blakely* was decided in June 2004 and only applies to cases that were not yet final at that time. *See State v. Febles*, 210 Ariz. 589, ¶ 17, 115 P.3d 629, 635 (App. 2005). Fong's case became final in 1997 after the Arizona Supreme Court affirmed his convictions and sentences and the United States Supreme Court denied his petition for writ of certiorari. *See State v. Soto-Fong*, 187 Ariz. 186, 928 P.2d 610 (1996), *cert. denied*, 520 U.S. 1231, 117 S. Ct. 1826 (1997); *see also State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003) (defendant's case final when appeals exhausted and petition for certiorari has been decided or time to file has lapsed). And because we have concluded that the trial court properly limited the scope of resentencing to the murder convictions, we likewise conclude the aggravated sentences he received on his

non-murder convictions were final at the time *Blakely* was decided. Accordingly, the trial court did not err when it did not disturb those sentences.

PETITION FOR REVIEW

Newly Discovered Evidence

¶25 Fong argues the trial court erred in its rulings surrounding his claims, pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., that evidence discovered since his trial proves his innocence. We review a trial court's denial of post-conviction relief for an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). To obtain post-conviction relief based on newly discovered evidence,[7] a petitioner must show "[n]ewly discovered material facts probably exist and such facts probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32.1(e). To be entitled to an evidentiary hearing, a petitioner must present a "colorable" claim, "showing that the allegations, if true, would have changed the verdict." *State v. Krum*, 183 Ariz. 288, 292, 903 P.2d 596, 600 (1995).

[7]Fong also argues, based on the new evidence, that he is actually innocent pursuant to Rule 32.1(h). That rule provides a defendant is entitled to post-conviction relief if he "demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found the defendant guilty of the underlying offense beyond a reasonable doubt." For the same reasons we have concluded the trial court did not err when it found he had not raised a colorable claim of newly discovered evidence based on the New Yorker article, we conclude the trial court did not err in finding he had not raised a colorable claim of actual innocence.

¶26 The only new evidence Fong presented was a magazine article from the New Yorker.[8] It contained a summary of a statement by Carole Grijalva-Figueroa, apparently made to a private investigator and transcribed, that she was the "lookout" at the murders and that Fong and the other two men tried for the murder, Andre Minnitt and Christopher McCrimmon, were not involved. Given the opportunity to investigate further, Fong was unable to produce any other evidence. He did not produce an affidavit or any sworn statement from Grijalva-Figueroa or show that she would be available to testify at a hearing. Nor did he produce an affidavit from the reporter that Grijalva-Figueroa had actually made those statements. Therefore, in view of the other evidence supporting Fong's guilt, including fingerprints on evidence found at the scene of the murders, the trial court did not abuse its discretion in concluding, based on this magazine article only, that Fong had failed to present a colorable claim of newly discovered evidence. *Cf. id.* at 292-93, 903 P.2d at 600-01 (third-party affidavits not based on personal knowledge rarely sufficient to raise colorable claim of newly discovered evidence).

[8]Although Fong also refers to statements by Keith Woods and Andre McCrimmon as newly discovered evidence, this evidence was included in his first Rule 32 petition. And the statement by Tanisha Price Woods, which Fong also argues constitutes newly discovered evidence, merely went to Keith Woods's credibility, and thus was not sufficient to present a colorable claim for relief. *See State v. Cooper*, 166 Ariz. 126, 129, 800 P.2d 992, 995 (App. 1990) (claim of newly discovered evidence not colorable where evidence is "'simply . . . cumulative or impeaching'"), *quoting State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989).

Violation of Vienna Convention on Consular Relations

¶27 Fong argues the trial court erred when it denied his claim for relief based on the state's violation of his right as a Mexican national to consular notification under the Vienna Convention on Consular Relations (VCCR). The trial court held the claim was precluded as having been raised in his first Rule 32 petition. But Fong argues that an interim decision of the International Court of Justice and a subsequent Presidential Determination that state courts must give effect to the decision entitled him to a hearing on this claim. *See Case Concerning Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 12 (Mar. 31).[9] *Avena* requires courts to provide review and reconsideration of severe sentences with respect to violations of the VCCR. *Id*. at 73. And the Presidential Determination orders state courts to give effect to *Avena* "in accordance with general principles of comity."[10]

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[9]The trial court also denied relief on the VCCR claim because it found *Avena* only applicable to capital cases. We disagree. Although Fong and the rest of the named plaintiffs were on death row at the time of the decision, *see Avena*, 2004 I.C.J. at 24, the court specifically stated that its decision applied to foreign nationals facing "severe penalties." *Id*. at 73.

[10]The United States Supreme Court has held, notwithstanding *Avena*, that claims under the VCCR are subject to state procedural default rules. *See Sanchez-Llamas v. Oregon*, ___ U.S. ___, 126 S. Ct. 2669, 2687 (2006). Moreover, since *Avena*, the United States has withdrawn from the jurisdiction of the International Court of Justice in disputes over VCCR claims. *Medellin v. Dretke*, 544 U.S. 660, 682, 125 S. Ct. 2088, 2101 (2005) (O'Connor, J., dissenting). Our determination that the trial court did comply with *Avena* despite its application of procedural default rules does not constitute an endorsement of *Avena*'s binding authority on this court, but rather a refusal to address an unnecessary question not presented to us.

¶28 Fong has been provided a meaningful review of his sentences with respect to the VCCR violation. He raised it in his first Rule 32 petition. The claim was briefed by both parties and Mexico as amicus curiae and the court heard argument on the claim. The parties agreed the trial court could rule on the claim without an evidentiary hearing. Because the claim could have been raised at trial or on appeal, the trial court, pursuant to a comment to the version of the rule in effect at the time, analyzed whether Fong had suffered prejudice by his counsel's failure to raise the claim. *See* 170 Ariz. LXVII-LXVIII (former Rule 32.2(a)(3), cmt.). The trial court found Fong had suffered no prejudice as a result of the violation because Fong had based his claim of prejudice on what the Mexican government could have provided as mitigation evidence at trial, but none of the mitigation evidence subsequently provided in support of the petition appeared to have come from the Mexican government. The review required by *Avena* consists of "ascertaining whether in each case the violation of [the VCCR] committed by the competent authorities caused actual prejudice to the defendant in the process of the administration of criminal justice." 2004 I.C.J. at 60. Because the trial court made that determination when it denied relief on Fong's first Rule 32 petition, we conclude Fong has been provided review of his sentence in the context of the VCCR violation and the trial court did not err in denying his claim for relief on that basis.

Remaining Claims

¶29 Fong also contends the trial court erred in denying his claims for relief based on the state's misconduct and failure to disclose exculpatory evidence, the conflict of interest of his trial counsel, ineffective assistance of counsel, and erroneous aggravation.[11] The trial court found the claims precluded, as they had been raised in Fong's first petition for post-conviction relief. Fong argues they should not have been precluded, generally contending that additional evidence has been discovered since the initial post-conviction proceedings. But none of the claims at issue falls under the exceptions to the preclusion doctrine for claims already raised and ruled upon in prior post-conviction proceedings. *See* Ariz. R. Crim. P. 32.2(b). And to the extent Fong is arguing that they fall under the newly discovered evidence exception to preclusion, *see id.*, the trial court concluded that most of the evidence was not new and the evidence that was new merely went to the credibility of defense witness Keith Woods, and thus was not sufficient to present a colorable claim for relief. *See State v. Cooper*, 166 Ariz. 126, 129, 800 P.2d 992, 995 (App. 1990) (claim of newly discovered evidence not colorable where evidence is "'simply . . . cumulative or impeaching'"), *quoting State v. Bilke*, 162 Ariz. 51, 53, 781 P.2d 28, 30 (1989). We find no abuse of discretion in the trial court's rulings on these claims.

[11]Fong also raised claims of cumulative error and residual doubt, which were dismissed by the trial court. We have already determined the court was not required to consider the mitigating factor of residual doubt at sentencing. *See supra* n.6. And because we have found no error, Fong has not shown he would be entitled to relief based on cumulative error. We find no abuse of discretion in the trial court's denial of relief on these two claims.

CONCLUSION

¶30 For the foregoing reasons, we affirm Fong's sentences on the three murder convictions. We grant review of his petition, but we deny relief.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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GARYE L. VÁSQUEZ, Judge